No. 43

# In the Supreme Court of the United States

OCTOBER TERM, 1957

STEFENA BROWN, PETITIONER

v.

UNITED STATES OF AMERICA.

*On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON REARGUMENT

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In her supplemental memorandum, petitioner assumes, for purposes of argument, that her direct testimony, given as a witness in her own behalf, constituted a waiver of privilege and that she was consequently obliged to answer, on cross-examination by Government counsel, the concededly relevant questions designed to test the veracity of her "general denials" (the term is petitioner's; Supp. Memo., p. 7).[1]

Petitioner argues that, even on this assumption, there was not, in the circumstances of this case, a

[1] The proposition that there was a waiver of privilege was briefed by the Government, last Term, and will not be reargued herein.

contempt. She contends further that, in any event, there was not such a contempt as would warrant the imposition of the sentence (six months' imprisonment) which was adjudged.[3]

1. The acts of contempt in this case consisted of deliberate and persistent refusals, in the face of the court, to comply with direct orders of the court that petitioner answer specific questions (R. 33-40).[4] The orders to answer were given only after the court had carefully considered and expressly overruled petitioner's claim of privilege.[5]

The disobedience of the court's directions to an-

[3] The points now argued by petitioner were not raised in the petition or argued in petitioner's main brief.

[4] It may be conceded that the refusals were in polite terms; they were nonetheless deliberate and persistent.

[5] The claim of privilege was asserted at the session of February 17, 1955, at which point the court entertained argument from counsel and reserved its ruling (R. 32). The following morning, the court overruled the claim (R. 33). (As is evident from the context and from the docket entries which appear at R. 1, the date appearing at R. 33 should read February 18, 1955, rather than February 16, 1955.) The court's opinion on the contempt issue, rendered the same day (February 18, 1955), states (R. 38):

> I have one other matter to dispose of. This morning the defendant refused to answer certain questions submitted or propounded to her by the Government. She refused to answer, claiming her privilege not to do so by reason of the Fifth Amendment. At that time I cautioned the witness and explained to her that she was required to answer; that she had waived the benefit of the Fifth Amendment, she had waived the right to claim any privileges under the Fifth Amendment, by reason of having testified as a witness in her own behalf.

swer the questions were acts of contempt which fall squarely within the class of contempts defined in 18 U. S. C. 401 (3), which states:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Refusal to obey a direct and lawful order of the court is, of course, a classic form of contempt—one which has always been within the embrace of this country's contempt statutes and has had a long history at common law. See Brief for the United States in *Green and Winston* v. *United States*, No. 100, this Term, pp. 29-33, 72-76. There is no requirement, as in the case of other forms of misbehavior,[5] of a finding of obstructive effect, a circumstance which has its obvious explanation in the fact that a refusal to comply with a court's lawful order is necessarily damaging to the standing of the courts and to the administration of justice.[6] Judicial authority would soon be undermined if the courts lacked the indispensable

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[5] Section 401 (1) makes punishable as a contempt "[m]isbehavior of any person in its [the court's] presence or so near thereto as to obstruct the administration of justice."

[6] In the words of Socrates to Crito, rejecting the latter's proposal for Socrates' escape from prison: "Do you imagine that a state can subsist and not be overthrown, in which the decisions of law have no power, but are set aside and trampled upon by individuals?" *The Dialogues of Plato*, Jowett trans. (Britannica ed., 1952), p. 216.

power to compel compliance with their rulings. As this Court has stated, "the power of a court to make an order carries with it the equal power to punish for a disobedience of that order." *In re Debs*, 158 U. S. 564, 594. In Lord Erskine's words, "Every court must have power to enforce its own process and to vindicate contempts of its *authority;* otherwise the *laws would be despised*, and *this* obvious *necessity* at once produces and limits the process of attachment" (quoted in Stansbury, *Report of the Trial of James H. Peck*, p. 398; emphasis in original). We would also give particular emphasis to the thought expressed in a leading English contempt case (one also involving a refusal to testify by a witness who had made an invalid claim of privilege): "The power of commitment for contempt is indispensable to the administration of public justice; *and the knowledge that it is indispensable renders its exercise generally unnecessary.*" *Ex parte Fernandez*, 10 C. B. (N. S.) 3, 57; 142 Eng. Reprint 349, 370 (emphasis added).[7]

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[7] The essential facts of the *Fernandez* case may be briefly stated. Fernandez had appeared before a Royal Commission and given testimony implicating one Charlesworth in corrupt election practices. Charlesworth was thereafter charged with bribery and Fernandez summoned as a witness for the Crown. At the trial, Fernandez asserted privilege against self-incrimination, notwithstanding the fact that the Royal Commission had granted him a certificate of immunity from prosecution. It was his position that the certificate afforded him less than complete protection because he might still be liable to impeachment by the House of Commons. The claim was overruled as legally insufficient and the witness

Certainly, a refusal to testify (or to be sworn as a witness) is no exception to the rule that disobedience of a court order is punishable as a contempt. *Ex parte Hudgings*, 249 U. S. 378, 382; 8 Halsbury, *Laws of England* (3d ed., 1954) 5-6; *Ex parte Fernandez*, *supra*; and see p. 11, note 15, *infra*. For a collection of state court cases, see 12 Am. Jur., *Contempt* § 15. Indeed, the need for the contempt power is most striking when the act of disobedience takes place in the presence of the court and in the midst of a proceeding.

2. Petitioner argues, on two grounds, that in this case the disobedience of the orders to testify was not contemptuous: firstly, that her refusal was based upon an opinion, entertained in good faith, that the court had erroneously overruled her claim of privilege; secondly, that her refusal cannot be said to have obstructed the judicial process, as evidenced by the fact that the Government's case prevailed notwithstanding the Government's inability to elicit the testimony which it sought. We believe that neither of these arguments is tenable.

*a.* There is no finding as to whether petitioner's refusal to abide by the court's ruling was the product of a good-faith belief that the court had erred or was the outgrowth of a calculated effort to secure

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directed to testify. Relying on advice of counsel, he persisted in refusal and was sentenced for contempt to six months' imprisonment and a fine of £500. On application for a writ of habeas corpus, the Court of Common Pleas denied relief in accordance with the unanimous views of Erle, C.J., Willes and Byles, JJ.

an impermissible advantage.* In our view, no finding on this point was required, for we take it to be settled beyond doubt that one who refuses to abide by a ruling or order of a court does so at his peril. It is extremely difficult to conceive of any other principle upon which the courts could operate. Can parties and witnesses ignore the lawful rulings of the tribunal and then be heard to say, "There was no contempt because I sincerely disagreed with the ruling and considered it wrong."? The question, we believe, answers itself. As Justice Holmes pointed out in *Nash* v. *United States*, 229 U. S. 373, 377, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." Even more clearly, if a person chooses to disobey an explicit court ruling on the basis of his own estimate of what the law is, he takes the risk that the judge may be correct and that he may be wrong.

Over the years, the validity of rulings denying claims of Fifth Amendment privilege has been tested in the manner that was utilized here—by refusing to obey a direction to answer and challenging the lawfulness of the direction on appeal from a sentence

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* Petitioner would have this Court assume that her highly unusual course of action—coming forward as a witness in her own behalf to state general denials and then taking refuge in a claim of privilege when cross-examined—was the result of a misguided notion as to the character of the privilege against self-incrimination. But this is by no means self-evident, and we fail to see how an appellate court could make the assumption.

for contempt.[9] See, *e. g.*, *Brown* v. *Walker*, 161 U. S. 591; *Wilson* v. *United States*, 221 U. S. 361; *Wheeler* v. *United States*, 226 U. S. 478; *Grant* v. *United States*, 227 U. S. 74; *United States* v. *White*, 322 U. S. 694; *Blau* v. *United States*, 340 U. S. 159; *Rogers* v. *United States*, 340 U. S. 367; *Hoffman* v. *United States*, 341 U. S. 479; *Regan* v. *New York*, 349 U. S. 58; *Ullmann* v. *United States*, 350 U. S. 422. In eight of the ten cited cases (*Blau* and *Hoffman* are the two exceptions), this Court concluded that the claim of privilege was not a valid one. In these eight, it sustained the contempt sentences without any suggestion that the good faith of the party in making the claim of privilege was relevant to the question of whether there was a contempt.[10] Yet, it will hardly be gainsaid that in all eight the legal issue of privilege was a substantial one. Indeed, five of the eight cases were decided over vigorous dissent.[11]

*b.* A wilful disobedience of a lawful order of the court is necessarily damaging to the standing of the courts and to the administration of public justice. This is but to say that a lawful order is one which has a legitimate purpose in terms of the function and jurisdiction of the tribunal which issues it. Here, the purpose was to secure testimony relevant to the issues which the court was called upon to

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[9] In some situations, this may be the only means of testing the validity of the ruling. See *Cobbledick* v. *United States*, 309 U. S. 323, 328.

[10] We know of no decision which makes such a suggestion.

[11] The exceptions are *Wheeler*, *Grant* and *White*.

decide, a purpose fundamental in the trial of all law suits. While that purpose must give way, to be sure, when it conflicts with a valid claim of privilege, it is a controlling consideration when there is no privilege to assert.

It is no answer that the Government's suit in any event prevailed. The contemptuous character of a refusal to testify is scarcely altered by the fact that it failed to produce a complete paralysis of the proceeding. It is enough that the evidence refused was relevant and not privileged. It is enough, otherwise stated, that the direction to answer was a proper and a lawful one.

The basic fallacy in petitioner's argument is that it overlooks the fact that the criminal contempt power is designed to vindicate the authority of the court and the public interest which it represents, not to redress harm (or potential harm) to an adverse litigant. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441.[12] When a court's lawful orders are impugned or disobeyed, the standing of the courts and their ability to discharge their responsibilities are necessarily affected adversely, whether or not the act of resistance proves crucially damaging to the other party (or parties) in the particular case.[13]

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[12] See, also, *Ex parte Burr*, 1 Fed. Cas. 791, 797 (C. C., Dist. of Col.): "It is the public interest, and not the personal pride of the judges * * * which claims this power for the courts."

[13] Compare this Court's observation in *United States* v. *United Mine Workers*, 330 U. S. 258, 294, that wilful violations of an injunction may be punishable as criminal con-

It is doubtless for this reason, as noted above, that wilful disobedience of a lawful order of the court is defined by statute as a contempt, whereas certain other forms of misbehavior are deemed contempts of court only when shown to have had an obstructive effect upon the proceedings. The public knowledge that the courts can and will enforce their lawful orders gives those orders force and respect; by the same token, this awareness makes relatively infrequent the need for resort to the contempt power. *Ex parte Fernandez, supra.*

Relying on *Ex parte Hudgings*, 249 U. S. 378, and *In re Michael*, 326 U. S. 224, petitioner argues that just as perjury, without more, is not deemed punishable as a contempt, so, also, wilful disobedience, without more, should not be treated as contemptuous. As already observed, however, wilful disobedience of a lawful order is not only an historic form of contempt; it is explicitly and unambiguously defined by statute as constituting, in and of itself, a contempt. 18 U. S. C. 401(3).[1] As we have also stressed, the position of the courts would be undermined if they could not promptly and effectively enforce their rulings in the face of recalcitrance.

This Court has decided, to be sure, that perjury, standing alone, should not be deemed to fall within the language of 18 U. S. C. 401(1)—"Misbehavior of

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tempts even though the decree is ultimately set aside on appeal.

[1] The language of 18 U. S. C. 401 is substantially the same as in predecessor statutes. See Act of March 2, 1831, 4 Stat. 487; *Nye* v. *United States*, 313 U. S. 33, 44-46.

any person in its [the court's] presence * * * obstruct[ing] the administration of justice." Although it would seem enough to point out that the instant case falls squarely within the *third* paragraph of 18 U. S. C. 401, it may be added that none of the policy considerations which support the view that perjury is not, *per se*, a violation of the contempt statute have any application to the issue of wilful disobedience.

Perjury is a separate offense under the Criminal Code, as this Court emphasized in both *Hudgings* and *Michael*. 249 U. S. at 382; 326 U. S. at 226-227. It is also a crime which presents peculiar problems of proof and unusual dangers of miscarriage of justice, as evidenced by this Court's insistence upon adherence to the so-called "two-witness" rule. *Weiler* v. *United States*, 323 U. S. 606. This combination of circumstances would naturally make for considerable reluctance to permit substitution of the contempt power for the ordinary processes of the criminal law. There is yet a further important factor. If a judge could invoke his summary power to punish for contempt whenever he believed that a witness was telling an untruth, there would be grave risk that the power might be used to exact "from the witness a character of testimony which the court would deem to be truthful." *Hudgings*, *supra*, 249 U. S. at 384. This would mean, in the Court's words (*ibid.*), "a potentiality of oppression and wrong" imperiling "the freedom of the citizen when called as a witness."

It remains only to add that in both *Hudgings* and *Michael* this Court carefully distinguished between

the situation where the witness may be lying and the situation where he is violating the duty to testify. 249 U. S. at 382; 326 U. S. at 228-229. Thus, in distinguishing *United States* v. *Appel*, 211 Fed. 495 (S. D. N. Y.), this Court stated in *Michael* (326 U. S. at 228-229) that "there the Court thought that the testimony of Appel was '* * * not a bona fide effort to answer the question at all'." [15]

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[15] In the *Appel* case, Judge Learned Hand (then a district judge) had held (211 Fed. at 495-496):

> The power of the court to treat as a criminal contempt a persistent perjury which blocks the inquiry is settled by authority in this circuit. * * * It is indeed impossible logically to distinguish between the case of a downright refusal to testify and that of evasion by obvious subterfuge and mere formal compliance.
>
> The rule, I think, ought to be this: *If the witness' conduct shows beyond any doubt whatever that he is refusing to tell what he knows, he is in contempt of court. That conduct is, of course, beyond question when he flatly refuses to answer, but it may appear in other ways.* A court, like anyone else who is in earnest, ought not to be put off by transparent sham, and the mere fact that the witness gives some answer cannot be an absolute test. For instance, it could not be enough for a witness to say that he did not remember where he had slept the night before, if he was sane and sober, or that he could not tell whether he had been married more than a week. If a court is to have any power at all to compel an answer, it must surely have power to compel an answer which is not given to fob off inquiry. Nevertheless, this power must not be used to punish perjury, and the only proper test is whether on its mere face, and without inquiry collaterally, the testimony is not a bona fide effort to answer the questions at all. [Emphasis added.]

To similar effect, see *In re Meckley*, 137 F. 2d 310 (C. A. 3), certiorari denied, 320 U. S. 766; *United States* v. *McGovern*,

3. The penalty imposed by the district court—six months' imprisonment—was a serious sentence.[16] It must be recognized, however, that it was the primary responsibility of the trial judge to determine what measures were needful and appropriate to vindicate the authority of the court. Although petitioner argues that she adopted her highly unusual course of action in good faith and that her refusal to testify did not alter the outcome of the particular case (see *supra*, pp. 6-11), she ignores a factor which the court was required to give serious weight—"the importance of deterring such acts [of wilful disobedience] in the future." *United States* v. *United Mine Workers*, 330 U. S. 258, 303.[17]

We take no issue with the proposition that this

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60 F. 2d 880, 889-890 (C. A. 2). Although the First Circuit has seemingly disagreed with the proposition that an obviously false answer given for purposes of evasion may be deemed tantamount to a refusal to testify, it certainly has implied no doubt that an outright refusal to heed a court's direction to testify is a contempt. *Carlson* v. *United States*, 209 F. 2d 209, 214, and companion cases reported *seriatim*.

[16] There are, however, numerous instances of more severe penalties for the same type of contempt, (*i. e.*, refusal to testify). See Brief for the United States in *Green and Winston* v. *United States*, No. 100, this Term, pp. 78-79.

[17] Petitioner is correct in stating that the court was not required to give any credence to her direct testimony when she refused to submit to cross-examination. But the suggestion that the complete solution was to strike her testimony overlooks (1) that the court and the adverse party were entitled to all relevant testimony not privileged and (2) that striking the testimony would hardly vindicate the court's authority to implement its lawful orders.

Court has supervisory power over sentences in contempt cases. On the contrary, we believe that the exercise of this jurisdiction is salutary, for it would be idle to deny that there is potentiality for abuse in the contempt power—a potentiality which stems principally from the fact that a judge may become personally involved. Cf. *Offutt* v. *United States*, 348 U. S. 11, 15-17. But there is neither indication nor claim that the district judge in this case was anything but temperate and dispassionate in the conduct of the proceedings before him. And since, in our view, the sentence cannot be said to be inordinate, we believe that it should be sustained as one falling within the considerable discretion which must be accorded the trial judge.

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in our main brief, the judgment should be affirmed.

Respectfully submitted,

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